In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 965

GEORGE KOHATSU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 351 F. 2d 898.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (1 V. 68).[1] A timely petition for rehearing was denied on December 2, 1965. On December 30, 1965, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 31, 1966. The petition was filed on January 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to the five-volume record on file with the Clerk of this Court.

219-916—66

QUESTION PRESENTED

Whether records furnished by petitioner and statements made by him to Internal Revenue Service agents investigating his income-tax returns were obtained by the agents in violation of petitioner's Sixth Amendment rights.

STATEMENT

After a trial by jury (1 V. 32) petitioner was convicted on four counts of a six-count indictment charging him with executing false partnership information returns and attempting to evade his own income taxes for 1957 and 1958 (1 V. 1–6) in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954. He was sentenced to concurrent one-year terms of imprisonment on each of the counts and to pay a $10,000 fine on one count (1 V. 33).

Petitioner kept the books and prepared the tax returns for a partnership of which he was a member (3 V. 355). According to government computations presented at his trial, petitioner understated the partnership net income by a total of $73,411.30 in 1957, 1958 and 1959 (3 V. 420–421), and he understated his own taxable income in these years by $29,338.29 and his personal taxes by $11,119.88 (3 V. 433–435). Certain farm produce sales and farm labor camp income was omitted, and excessive depreciation was taken on a trailer park owned by the partnership as a result of petitioner's overstatement of the invested costs.

The evidence relevant to the constitutional claim made here by petitioner is as follows: By a letter to petitioner mailed June 27, 1960, and by subsequent

phone calls, Internal Revenue Agent Stapley initiated a series of interviews with petitioner between July 1960 and late summer of 1963 (2 V. 105, 107, 373). At the outset, Agent Stapley informed petitioner that his 1958 tax return was under examination (2 V. 106). Over a period of time, petitioner gave Stapley cancelled checks (2 V. 117, 128), books of original entry (2 V. 109), and two contracts which, he asserted, established the cost basis of the trailer park (2 V. 132). The contract prices totalled $260,771, but the cancelled checks showed that the cost basis of the park was $201,575.63 (3 V. 417). Petitioner told Stapley that discrepancies between partnership bank deposits and reported gross receipts were due to the transfer of $40,500 from a safety deposit box to the bank account (2 V. 130), and that the trailer park construction cost included $60,000 paid in cash to the contractor (2 V. 127). Both these statements were proved untrue at the trial (2 V. 215–H, 4 V. 714).

In early August 1961, Stapley referred the matter to the Intelligence Division (2 V. 199). On September 14, 1961, Stapley came to petitioner's home with Special Agent Vitello, whose duties were to investigate and make recommendations on income-tax violations (3 V. 306). Vitello showed his credentials to petitioner on this occasion (3 V. 307). Thereafter, petitioner supplied Vitello with various checks, invoices and other records and orally repeated his claim that he had made payments to the trailer park contractor (3 V. 309).

Vitello thereafter transferred his assignment to Special Agent Lines, who worked from the records

and documents given him by Vitello (3 V. 351–352). Lines interviewed petitioner on May 10, 1963 (3 V. 352). He informed petitioner at that time that the investigation was to determine whether there had been a violation of the internal revenue laws (3 V. 375). Lines also read to petitioner a statement advising him that he was under no legal duty to speak and that he could exercise the privilege against self-incrimination (3 V. 353, 376). Much of the evidence introduced at petitioner's trial had been obtained in the course of Stapley's and Vitello's investigations. Petitioner was not given any warning by either of these agents.

ARGUMENT

There is no merit to petitioner's contention that he became constitutionally entitled to the assistance of counsel at the time when Agent Stapley's investigation became "accusatory." The fact that the agent may have "strongly suspected" (Pet. 14) that petitioner had committed one or more criminal offenses did not change his investigation into a "criminal prosecution" in which petitioner was entitled to "have the Assistance of Counsel for his defence" within the meaning of the Sixth Amendment.

This case is plainly distinguishable from *Escobedo* v. *Illinois*, 378 U.S. 478, because the circumstances under which the challenged statements were made were totally different in *Escobedo* than they were here. The accused in *Escobedo* was in custody and had asked to be permitted to consult with his attorney. As we point out in our brief in *Westover* v. *United States*, No. 761, this Term, pp. 34–35, 42 (which we are serv-

ing on petitioner), the police conduct in *Escobedo* was such as to undermine the free choice guaranteed by the constitutional privilege against self-incrimination. In the present case, petitioner was under no coercive influences whatever. He was able freely to determine, after opportunities for consultation with anyone to whom he wished to speak, whether or not to make statements and to produce documents. His decision to cooperate with the agents was voluntary, and there was no constitutional obligation upon the agents to supply him with an attorney or to advise him of his right to retain one even if they had reason to believe him guilty of a criminal offense.

The Court may, of course, deem it appropriate to defer decision on this petition until the decision of cases now under advisement involving related issues.[2] We believe, however, that irrespective of the outcome of those cases, the constitutional claim is unsound when, as was true in this case, the suspect was not in custody or under any other coercive influence at the time he made his incriminating disclosures. Even if the Court were to hold in the cases now under advisement that a "criminal prosecution" in the Sixth Amendment sense begins with arrest, that determination would not render the Sixth Amendment right applicable to the pre-arrest and preindictment stage involved in this case. Courts of appeals

[2] *California* v. *Stewart*, No. 584; *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; *Westover* v. *United States*, No. 761; *Johnson and Cassidy* v. *New Jersey*, No. 762.

have so held since *Escobedo* v. *Illinois, supra.*[3] Prior to that decision and thereafter it has consistently been held that voluntary statements made to tax investigators were not inadmissible on account of a failure to warn the taxpayer of his right to be silent or to notify him that he could consult an attorney. *Scanlon* v. *United States,* 223 F. 2d 382, 384–385 (C.A. 1); *Greene* v. *United States,* 296 F. 2d 841, 842–843 (C.A. 2), vacated and remanded on other grounds, 369 U.S. 403; *United States* v. *Burdick,* 214 F. 2d 768, 773–774 (C.A. 3), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932; *United States* v. *Spomar,* 339 F. 2d 941, 943 (C.A. 7), certiorari denied, 380 U.S. 975; *Hanson* v. *United States,* 186 F. 2d 61, 64–66 (C.A. 8).[4]

Finally, we note that petitioner neither moved to suppress the challenged evidence in the district court nor did he object to its admission on the grounds now asserted. Consequently, the facts were not developed at trial, and there is no way of knowing from this

[3] See *Stanfield* v. *United States,* 345 F. 2d 523, 524 (C.A. 10); *Irwin* v. *United States,* 338 F. 2d 770, 777 (C.A. 9), certiorari denied, 381 U.S. 911.

[4] *Gower* v. *United States,* 16 A.F.T.R. 2d 5714, decided August 27, 1965 (M.D. Pa.), on which petitioner relies (Pet. 26–28), is inapposite. That case concerned a taxpayer's right to inspect documents which were in the custody of the Internal Revenue Service. The court's statement that those suspected of violating the tax laws are entitled to the same protections as other criminal defendants does not conflict with the result reached here. Our position is that any criminal defendant in petitioner's position—*i.e.,* being interviewed with regard to a possible crime while he is at liberty and before formalized proceedings have been instituted—is not within the Sixth Amendment's guarantee of assistance of counsel.

record whether or not petitioner did, in fact, consult an attorney while Agent Stapley's investigation was being conducted. The mere fact that he was not told that he could seek the advice of counsel and have an attorney present during his meetings with the agent should obviously not render his statements and other evidence inadmissible if, in fact, he acted on the advice of counsel or, knowing that he could retain an attorney, voluntarily chose to proceed on his own.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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